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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 73-477

RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County,

Petitioner,

vs.

ROBERT PUGH and NATHANIEL HENDERSON, on their own behalf and on behalf of all others similarly situated, and
THOMAS TURNER and GARY FAULK, on their own behalf and on behalf of all others similarly situated,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion and subsequent order of the district court are reported in 332 F. Supp. 1107 (S.D. Fla. 1971) and 336 F. Supp. 490 (S.D. Fla. 1972), and reprinted at pages 70-96 of the Appendix. The opinion of the court of appeals is reported at 483 F.2d 778 and is set forth at pages 1 et seq in the appendix to the Petition for Certiorari.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

I

WHETHER A PERSON IN STATE CUSTODY HAS A CONSTITUTIONALLY PROTECTED RIGHT TO A PRELIMINARY HEARING.

II

WHETHER A UNITED STATES DISTRICT COURT JUDGE HAS JURISDICTION TO INTERFERE BY DECLARATORY AND INJUNCTIVE ACTION WITH DULY CONSTITUTED STATE CRIMINAL PROCEEDINGS ON THE QUESTION OF PRELIMINARY HEARINGS.

CONSTITUTIONAL PROVISIONS INVOLVED

1. Fourth Amendment to the Constitution of the United States:

> "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated.

2. Fourteenth Amendment to the Constitution of the United States:

> ". . . nor shall any State deprive any person of life, liberty, or property without due process of law. . . ."

STATEMENT OF THE CASE

(The parties will be referred to in this Brief as they stood in the district court.)

Plaintiffs Pugh and Henderson, on March 22, 1971 (A. 2 et seq) joined subsequently on April 12, 1971 (A. 82 et seq) by Plaintiffs Turner and Faulk, filed a class action in the United States District Court For The Southern District of Florida, seeking an injunction and a declaration that a preliminary hearing before a committing magistrate on probable cause after arrest and before trial was compelled by the Fourth Amendment and by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. The Plaintiffs asked the Court to compel the Defendant—State Attorney Gerstein, among other defendants, to grant such a hearing to Plaintiffs and members of their class and to declare that they were so entitled to such a hearing (A. 11).

On April 6, 1971, Defendant Gerstein filed his Answer and a Motion for Summary Judgment (A. 17 et seq). In his Memorandum of Law in support of the Motion for Summary Judgment, the Defendant Gerstein admitted as undisputed facts the following:

> 1. The Plaintiffs were charged at said time with violations of the Florida Statutes.
>
> 2. They had been charged by Information as permitted by Article I, Section 15 (a) of the Florida Constitution.
>
> 3. That prior to the filing of the Information, there was no preliminary hearing.
>
> 4. That the Informations were filed by the Defendant Gerstein or by one of his duly appointed Assistant State Attorneys, under and by his authority.
>
> 5. It is the policy and practice of the Defendant, Gerstein, his agents, servants and employees, to file Informations based on an independent examination of the facts, notwithstanding that there has been no preliminary hearing.
>
> 6. It is the policy and practice of the Defendant, Gerstein, his agents, servants and employees, to resist any attempt to have preliminary hearings after an Information has been filed or an Indictment has been found (A. 22).

In an "Order and Final Judgment" filed October 12, 1971 the district court phrased the issue then before the court as follows:

> "The principal constitutional issue for determination is of course whether one who is arrested and held for trial upon an Information filed by the State Attorney is entitled to a hearing before a judicial officer, on the question of probable cause (A. 77).
>
> To which issue the Court answered:
>
> "The Court finds that under the Fourth and Fourteenth Amendments, arrested persons, whether or not released on bond, have the constitutional right to a judicial hearing on the question of probable cause." (A. 85).

Those arrested under indictment are not included in the order (A. 73-74).

The Court accordingly granted the sought after relief to the Plaintiffs and further directed:

> "That defendants shall, within 60 days of the date hereof, submit to the Court a plan providing for a preliminary hearing before a judicial officer empowered to act as committing magistrate in all cases wherein prosecution is to be upon direct Information. The preliminary hearing shall be within a reasonable time of the arrest." (A. 87).

On January 25, 1972, the District Courts' Order Adopting Plan to Provide Preliminary Hearings was filed (A. 88 et seq). In it, the Court required that all persons arrested with or without warrants in Dade County, Florida, be brought before a committing magistrate for a first appearance hearing within three hours of the time the defendant is taken into custody. At the first appearance hearing, the magistrate was required to advise the defendant of the charges against him and of his rights under the Constitutions of the United States and of Florida, and was to appoint Counsel should the defendant be indigent. He was also required to set a date and time for a preliminary hearing to determine whether there was probable cause that the defendant "committed the offense with which he is charged."

Under the Plan, all persons subject to booking had to be booked at the Metropolitan Dade County Jail. Committing magistrates were to be available for first appearance hearings on a twenty-four hour, seven day a week basis. If a magistrate discharged a defendant after finding no probable cause that an offense was committed by the defendant, the defendant could not be held to answer to a subsequent charge for the same offense by Information filed by the State Attorney. The defendant could only be so charged upon an Indictment by the Grand Jury returned within thirty days of the defendant's discharge. If a defendant was not given a preliminary hearing in the time provided in the Order of the Court, and the hearing was not properly postponed or waived, all charges against the defendant were to be withdrawn and the defendant, if incarcerated, immediately released, with the State not permitted to refile a charge unless the defendant was indicted by the Grand Jury within thirty days of the

second withdrawal. Under the Order, the Plan was to be put into effect within ninety days from January 25, 1972 (A. 96).

It was from the "Order and Final Judgment" of October 12, 1971, and the January 25, 1972 Order Adopting Plan to Provide Preliminary Hearings that the appeal to the Court of Appeals was taken.

The Plan was stayed by the court of appeals pending appeal. During this time the judiciary of Dade County and other parties involved in the county's criminal justice system implemented a separate plan providing for preliminary hearings (A. 98).

Subsequent to oral argument in the court of appeals, that court directed the district court to make specific findings of fact on the constitutional deficiencies, if any, as between the district courts' Plan and the plan then in effect in Dade County (A. 98).

The district court, after oral argument, made its findings taking into consideration the Amended Rules of Criminal Procedure promulgated by the Florida Supreme Court on December 6, 1972, which became effective February 1, 1973. These rules provide for a committing magistrate system but continue Floridas' long standing practice of permitting a state attorney to file a direct Information without providing a defendant a subsequent probable cause hearing by a magistrate (A. 104).

The rules make no provision for preliminary hearings for misdemeanants (A. 105)—They also provide different preliminary hearing times for those in custody charged

with capital offenses or offenses punishable by life imprisonment as compared to other incarcerated defendants charged with lesser felonies (A. 110).

The district court found, inter alia, that the practice of permitting direct filings of Informations by the state attorney without a subsequent probable cause hearing differed from its plan and was violative of the Fourth Amendment and the Due Process clause of the Fourteenth Amendment (A. 103).

The district court also found that not granting preliminary hearings to misdemeanants differed from its plan and therefore suffered from the same constitutional infirmity mentioned above (A. 105).

The district court also found that the practice of providing different preliminary hearing times to those charged with capital offenses or offenses punishable by life imprisonment differed from its plan and was violative of the due process and equal protection clauses of the Fourteenth Amendment and the Fourth Amendment (A. 110).

Subsequently, in a letter to all counsel of record, dated June 1, 1973, the court of appeals, inter alia, asked, "In summary just what if anything is left of this appeal?" (A. 117).

In its joint memorandum of response, counsel stated that the major abiding substantive legal issue which remained intact was:

"DO THE FOURTH AND FOURTEENTH AMENDMENTS REQUIRE THAT ONE WHO IS ARRESTED AND HELD FOR TRIAL BE GIVEN A HEARING BEFORE A JUDICIAL OFFICER TO DETERMINE PROBABLE CAUSE EVEN IF AN INFORMATION HAS BEEN FILED AGAINST HIM BY A STATE ATTORNEY?" (A. 119)

In its order and decision of August 15, 1973 upholding the district court, the Court of Appeals held that reasons of comity did not bar the suit of plaintiffs and that, therefore, the court "need not decide whether this situation comprises an exception to Younger." [vs. Harris, 401 U.S. 37] (Pet. A. 7)

The court thereupon held that the Fourth and Fourteenth Amendments require that arrestees held for trial on informations filed directly by the state attorney must without unreasonable delay, be given a preliminary hearing before a judicial officer (Pet. A. 9-10, 21). The court also found constitutionally violative the disparity in time for preliminary hearings for those persons charged with capital crimes and those charged with offenses having life terms as possible punishment (Pet. A. 25, 26).

The court of appeals also held that misdemeanants were also entitled to preliminary hearings except where they are out on bond or charged with violating ordinances carrying no possibility of pre-trial incarceration (Pet. A. 25).

On September 18, 1973 the court of appeals filed its order granting the motion of defendant-state attorney to stay the issuance of the mandate in this cause. (A. 127).

SUMMARY OF ARGUMENT

Preliminary probable cause hearings for defendants in state custody whether charged with felonies or misdemeanors are not required by the United States Constitution. This has been the position taken by this Court repeatedly.

It is proper for the Florida Supreme Court in promulgating its Rules of Criminal Procedure governing preliminary hearings to exclude from the hearing requirement those defendants charged by indictment or information. The court of appeals although approving of this practice as it concerns indictments, refused to do so in connection with informations. By so doing it failed to realize that under Florida law there is no probable cause determination by a judge presiding over a grand jury as to criminal charges set out in an indictment. That judge's acts, after an indictment has been returned, are purely ministerial. A state attorney in Florida by law is permitted to determine probable cause and charge by information. The state attorney is in effect a one man grand jury and the court below was in error in not giving equal dignity to informations filed by the state attorney and indictments returned by the grand jury.

The lower court in affirming the district court's interference in a State of Florida criminal prosecution erroneously ignored the comity doctrine espoused by this court. The extraordinary circumstances which must be present before the comity rule can be overcome did not prevail in the case below.

ARGUMENT

I

A PERSON IN STATE CUSTODY DOES NOT HAVE A CONSTITUTIONALLY PROTECTED RIGHT TO A PRELIMINARY HEARING

The court of appeals below has held that the Fourth and Fourteenth Amendment to the United States Constitution require that Dade County, Florida provide preliminary hearings before judicial officers for all defendants in custody awaiting trial on either misdemeanor or felony charges. These hearings are mandated even when those in custody have been charged under informations sworn to by the state attorney. The only defendants exempted under the court's holding are those charged under indictment returned by the grand jury.

Throughout this litigation the defendant-state attorney has argued as dispositive of the Fourth and Fourteenth Amendment questions raised below this Court's decisions in *Hurtado v. California*, 110 U.S. 516 (1884) and *Lem Woon v. Oregon*, 229 U.S. 586 (1913). The court of appeals found them inapplicable holding that they related to the due process question of the necessity for a magistrate's preliminary examination of probable cause *prior* to the filing of an information. (Pet. A. 10-11).

The defendant-state attorney also cited as controlling authority below the cases of *Ocampo v. United States*, 234 U.S. 91 (1914) and *Beck v. Washington*, 369 U.S. 541 (1962). Equally to no avail. The court of appeals ruled that *Ocampo* also was concerned with the narrow question

of prior probable cause hearings. The court of appeals in so doing quotes the following language from *Ocampo*, which, it is submitted, does nothing but hone the thrust of the defendant-state attorney's argument:

Thus it quotes *Ocampo:*

> " 'It is insisted that the finding of probable cause is a judicial act, and cannot properly be delegated to a prosecuting attorney. We think, however, that it is erroneous to regard this function, as performed by committing magistrates generally . . . as being judicial in the proper sense. A finding that there is no probable cause is not equivalent to an acquittal, but only entitles the accused to his liberty for the present, leaving him subject to rearrest . . .' "

The concluding portion of the paragraph from *Ocampo* is of signal application here and was omitted in the court of appeals opinion. It is said there (234 U.S. at 100):

> ". . .Such was the nature of the duty of the committing magistrate in the common law practice. . . In short the function of determining that probable cause exists for the arrest of a person accused is only quasi judicial and not such that because of its nature it must necessarily be confided to a strictly judicial officer or tribunal."

Beck, supra was summarily disposed of by the lower court in a footnote as adding "nothing to Ocampo" in that *Beck* deals with "prior probable cause hearings." (Pet. A. 12). In doing so the court ignored completely this statement of law from Beck (369 U.S. at 541):

> "Ever since Hurtado v. California, 110 U.S. 516, 28 L.Ed. 232, 4 S.Ct. 111 (1884), this Court has consistently held that there is no federal constitutional impediment to dispensing entirely with the grand jury in state prosecutions. The State of Washington abandoned its mandatory grand jury practice some 50 years ago. *Since that time, prosecutions have been instituted on informations filed by the prosecutor, on many occasions without even a prior [which word, in view of Washington law, must be read in the context of "prior" to a trial on the question of guilt or innocence] judicial determination of 'probable cause'—a procedure which has likewise had approval here in such cases as Ocampo v. United States*, 234 U.S. 91, 51 L.ed. 1231, 34 S.Ct. 712 (1914) and *Lem Woon v. Oregon*, 229 U.S. 586, 57 L.ed. 1340, 33 S.Ct. 783 (1913)." (Emphasis supplied).

Justice Clark in so writing for the *Beck* majority was certainly aware of Washington law which requires neither *prior nor subsequent* judicial determinations of probable cause.

The law of that state is made clear by the case of *State v. Ollison*, (Wash. 1966) 411 P.2d 419. There the defendant after arrest on a warrant had a preliminary hearing for a probable cause determination set on a date certain by a justice of the peace. Prior to that date the prosecuting attorney filed an information in the superior court on the same charges. The defendant was subsequently arraigned, tried and convicted. The defendant on appeal argued that it was error not to grant a preliminary hearing *after* the filing in superior court of the direct in-

formation by the prosecutor. Properly disposing of such contention the Washington Supreme Court said:

> "We see no error in the superior court denial of a preliminary hearing after the information had been filed. A prosecuting attorney in the exercise of his official powers, where he has good cause to believe that a crime has been committed and that he can prove the defendant is guilty thereof, may file an information directly in the superior court without a preliminary hearing. In such a case, the preliminary hearing is not deemed requisite to or an essential element of due process of law." (Emphasis supplied).

The direct filing of criminal informations without prior or subsequent judicial probable cause determinations has long been sanctioned in Florida. Sec. 15 Declaration of Rights to the Florida Constitution; *Widener v. Croft*, 184 So.2d 444 (Fla. 1966); *Bradley v. State*, (Fla. 1972) 265 So.2d 533. It is also the practice, among other states, in Iowa, *State v. Clark*, (1965) 138 N.W.2d 120; Montana, *Petition of Knight*, (1964) 394 P.2d 855; Wyoming, *Orcutt v. State*, (1961) 366 P.2d 690, cert. denied 385 U.S. 874; Arkansas, *Beckwith v. State* (1964) 379 S.W.2d 19; and Connecticut, *State v. Hayes*, (1941) 18 A.2d 895. In the latter case the Connecticut Supreme Court said that state's attorneys have this power because they are invested with the common law power of attorney general. The filing of direct informations had been followed in Connecticut for nearly two centuries prior to 1941, and the practice, had, the court said, been "in vogue" prior to the adoption of the Connecticut constitution. It was further said by the court that "the investigation by the state's

attorney and the determination by him that there is reasonable ground to proceed takes the place of a preliminary hearing by a magistrate and sufficiently fulfills all of the requirements of due process of law." (Citing, inter alia, *Hurtado v. California*, supra.)

The foregoing state authorities recognize the power of state prosecutors to sit, in effect, as a one man grand jury. The district court thus should have given the same weight to a prosecutor's finding of probable cause as it did to a grand jury's. To the contrary it misconstrued Florida law entirely and exempted from judicial probable cause hearings persons charged with crimes by grand jury indictment (the same point was argued to and ignored completely by the court of appeals). The District Court, in so ruling, said that after a grand jury returns an indictment to a judge, that judge reviews it and either issues an arrest warrant "and causes the indictment to be filed or dismisses the charge." The Court then went on to say that this particular procedure provides "for a probable cause hearing, by a judicial officer, prior to trial and . . . (is) not therefore under attack in this litigation."

Under Florida law there is no probable cause determination by a judge as to criminal charges set out in indictments. The judge does not review the indictment and then "cause it to be filed" or dismiss the charge. Under Florida law and practice the judge presiding over a grand jury, once an indictment is handed up has only a ministerial function to perform. Under Rule 3.130 (k) of the Florida Rules of Criminal Procedure: "Upon the filing of either an indictment or information charging the commission of a crime, if the person named therein is not in custody or at large on bail for the offense charged, the

judge shall issue or shall direct the clerk to issue, either immediately, or when so directed by the prosecuting attorney, a capias for the arrest of such person. . . ."

The very nature of the criminal jurisprudential system in Florida makes the District Court's error (ratified by the Court of Appeals) manifest when it speaks of preliminary review of an indictment by a judge. In Florida, once indicted, the next stop in the system for the defendant is not the judge presiding over the grand jury, but the trial court and arraignment and other proceedings therein.

Professor Wright, in 1 Federal Practice and Procedure, 137, Sec. 80, recognizes that it is grand jurors who determine probable cause and not a judge:

> " . . . If the only purpose of the preliminary examination is to determine whether there is good cause for holding the defendant, this is an entirely logical rule. The grand jury has determined the issue of probable cause and there is no need to have a determination by the magistrate. . ."

The Wright view as to indictments is applied in Florida to informations. *Karz v. Overton* (Fla. 1971) 249 So.2d 763; *Maxwell v. Blount* (Fla. 1971) 250 So.2d 657.

A multitude of decisions from the various circuits was cited below for the proposition that due process does not mandate preliminary hearings in cases such as the instant one. These included *Scarborough v. Dutton* (5th Cir. 1968) 393 F.2d 6; *Kerr v. Dutton* (2d Cir. 1968) 393 F.2d 79; *Sciortino v. Zampano* (3d Cir. 1969) 358 F.2d 132; *Rivera*

v. Gov't of the Virgin Islands (4th Cir. 1967) 375 F.2d 988; *Barber v. U.S.* (6th Cir. 1944) 142 F.2d 805; *U.S. v. Luxenberg* (7th Cir. 1967) 374 F.2d 805; *Weber v. Ragen* (8th Cir. 1949) 176 F.2d 579; *U.S. v. Gross* (9th Cir. 1969) 416 F.2d 1205; *Austin v. U.S.* (10th Cir. 1969) 408 F.2d 808 and *Swingle v. U.S.* (D.C. Cir. 1068) 389 F.2d 220. In finding these cases not controlling the lower court sought to distinguish them on the basis that the issue in each of them was the validity of the trial as affected by lack of a preliminary hearing and not the validity of pre-trial detention as such. *Ocampo* and *Beck*, supra, are contrary to this position and should have been controlling authority.

Under present Florida and Dade County practice a great regard is had for the right of persons charged with crimes. Florida's speedy trial rule (Rule 3.191) requires that all persons charged with felonies must be tried within 180 days of arrest. Those charged with misdemeanors must be tried within 90 days. Upon demand defendants must be given a trial within 60 days.

Defendants entitled to preliminary hearings in Florida are given them in a shorter period of time than are defendants charged with crimes against the United States. (See Rule 3.131 (b), Florida Rules of Criminal Procedure).

The Florida practice of denying preliminary hearings to those persons charged under information or indictment accords with federal practice as set forth in 18 U.S.C. 3060 (e) and Rule 5 of the Federal Rules of Criminal Procedure.

There is no basis in the Constitution or in reason to hold the State of Florida and Dade County to a higher standard than that to which this Court has attached its imprimatur.

The Court of Appeals affirmed the district court's imposition of the preliminary hearing requirement in misdemeanor cases holding that "No sufficient justification exists for disallowing preliminary hearings for misdemeanants. The plight of an accused misdemeanant incarcerated without a hearing is just as serious as that of an accused felon. . ." In doing so, the court of appeals again overlooked Rule 5, supra which provides that a defendant charged with a "petty offense" is not entitled to a preliminary hearing. Surely Dade County Florida should not be held to a higher standard than is required by this Court in Federal cases.

From a practical standpoint, as alluded to briefly by the Chief Judge of the Magistrate Division of the Eleventh Judicial Circuit (Dade County) in the testimony mentioned in the court of appeals decision (Pet. A. 24) most misdemeanants in Dade County have disposition of their cases on the merits in a shorter time than they could be accorded a preliminary hearing under the rules now in effect.

II

A UNITED STATES DISTRICT JUDGE HAS NO JURISDICTION TO INTERFERE BY DECLARATORY AND INJUNCTIVE ACTION WITH DULY CONSTITUTED STATE CRIMINAL PROCEEDINGS ON THE QUESTION OF PRELIMINARY HEARINGS

The court of appeals below held that reasons of comity do not bar this suit. Quoting from its earlier decision in *Morgan v. Wofford* (5th Cir. 1972) 472 F.2d 822 the court reiterated that abstention under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1970) "was never intended where there is no possible state proceeding through which appellant may raise his constitutional objections to a state proceeding which has already occurred. (Pet. A. 8).

In affirming the declaratory and injunctive relief granted by the District Court, the Court of Appeals has caused the very federal-state court frictions warned about in the concurring opinion in its decision in *Le Flore v. Robinson* (5th Cir. 1971) 446 F.2d 715, 719.

The wisdom of the Congress in establishing (as set forth presently in 28 U.S.C. 2283) what has in effect become a presumption against federal interference with state proceedings in the Act of March 2, 1793, 1 Stat. 335, c22 Sec. 5 is made abundant in the light of the case here under review, with all of its myriad implications.

Cases such as the instant one make manifest the wisdom of Justice Frankfurter's philosophy (the doctrine of abstention) in *Railroad Commission v. Pullman Co.*, 312 U.S. 501 (1941):

> "The federal courts, 'exercising a wise discretion', restrain their authority because of scrupulous regard for the rightful independence of the state governments and for the sound functioning of the federal judiciary."

Due process does not compel the granting of a preliminary hearing. There was, accordingly, no basis for the District Court's interference in the criminal justice system in Dade County, Florida. As this Court said in *Younger v. Harris*, 401 U.S. 37, 42:

> "This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism . . .'"

It is submitted that the extraordinary circumstances necessary before the comity rule as heretofore espoused by this Court can be overcome, were not present in the instant case below.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

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Counsel for Petitioner

January 2, 1974

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished, by mail, to Bruce Rogow, Esquire, City National Bank Building, Miami, Florida and to Phillip A. Hubbart, Public Defender, Justice Building, 1351 N.W. 12th Street, Miami, Florida this 8th day of January, 1974.

_____

Attorney